BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUSAN L. WARING	)	
Claimant	)	
VS.	)	
	)	Docket No. 267,639
HERITAGE RESTAURANT	)	
Respondent	)	
AND	)	
	)	
TIG INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appealed the December 5, 2003 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on May 18, 2004, in Wichita, Kansas.

APPEARANCES

Thomas M. Warner, Jr., of Wichita, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record also includes the transcripts from the April 25, 2002 and June 5, 2003 preliminary hearings. And, as addressed below, the September 19, 2003 report from Robert K. Twillman, Ph.D., is determined to be part of the record. Furthermore, at oral argument before the Board, the parties agreed the November 19, 2003 report from Dr. C. Scott Anthony is not part of the evidentiary record and that claimant's average weekly wage while working for the Wichita Inn following her accident was $285.

ISSUES

This is a claim for a May 7, 2000 accident, which injured claimant's neck. In the December 5, 2003 Award, Judge Barnes determined claimant sustained a 20 percent task

loss and a 100 percent wage loss, which comprised a 60 percent work disability (a permanent partial general disability greater than the functional impairment rating).

The only issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?

Claimant argues she has a 40 percent task loss and a 100 percent wage loss, which creates a 70 percent work disability. Accordingly, claimant requests the Board to increase her permanent partial general disability from 60 percent to 70 percent.

Relying upon Dr. Philip R. Mills' testimony, respondent argues claimant did not sustain any task loss. In addition, respondent contends claimant has failed to make a good faith effort to find appropriate employment and, therefore, a post-injury wage should be imputed for purposes of the permanent partial general disability formula. Respondent argues claimant has no task loss and only an 11 percent wage loss. Accordingly, respondent contends claimant's permanent partial general disability should be reduced to her whole body functional impairment rating, which it contends is 15 percent.

2. Is the September 19, 2003 report from Robert K. Twillman, Ph.D., to Judge Barnes part of the evidentiary record in this claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On May 7, 2000, claimant injured her neck when she slipped and fell while working as a waitress for respondent. Claimant reported the accident but respondent delayed in authorizing medical treatment. On May 14, 2000, claimant left respondent's employment and began working part-time for another restaurant. Claimant worked approximately nine days for that employer until she could no longer tolerate the ongoing neck pain.

Claimant eventually was referred to Dr. Lewonowski. In February 2001, Dr. Lewonowski performed discectomies and fusions at the fifth, sixth, and seventh intervertebral levels of the cervical spine.

In early June 2001, Dr. Lewonowski released claimant to return to work with restrictions against bending, stooping, pushing, pulling, arms overhead, and tilting her head. Dr. Lewonowski told claimant to look for a desk job. Within days, claimant found a front desk clerk job with a former employer, Wichita Inn. The Wichita Inn employed

claimant from June 4, 2001, through July 12, 2002, when she was taken off work for several days due to ongoing neck symptoms.

At oral argument before the Board, the parties stipulated claimant's average weekly wage was $285 while she was employed by Wichita Inn.

Despite commencing a job search in July 2002, at the time of claimant's January 2003 regular hearing, claimant remained unemployed. At that hearing, claimant introduced a document that listed 49 contacts she had made with potential employers. Claimant's list included both initial and follow-up contacts.

1. The nature and extent of claimant's injury and disability.

Respondent presented the testimony of Dr. Philip R. Mills, who examined and evaluated claimant in April 2002 at respondent's request. According to Dr. Mills, who practices physical medicine and rehabilitation, claimant has spinal stenosis and chronic pain syndrome since her two-level cervical fusion, which he rates as comprising a 15 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). After concluding claimant should avoid overhead work, the doctor determined claimant had not lost the ability to perform any of the work tasks that she performed in the 15-year period before the May 2000 accident. In analyzing claimant's task loss, Dr. Mills considered the list of former work tasks as compiled by respondent's vocational expert, Karen Crist Terrill.

On the other hand, claimant presented the testimony of her medical expert, Dr. Pedro A. Murati, who also practices physical medicine and rehabilitation. According to Dr. Murati, who examined claimant in May 2002, claimant had a failed neck surgery and was possibly developing a complex regional pain syndrome. Dr. Murati rated claimant's injuries as comprising a 25 percent whole body functional impairment.

According to Dr. Murati, claimant should refrain from climbing ladders; crawling; heavy grasping with her left hand; above shoulder work with her left arm; lifting, pushing, pulling and carrying more than 10 pounds occasionally and five pounds frequently; working more than 18 inches away from her body; and avoid all awkward positions of her neck. Reviewing a list of former work tasks prepared by claimant's vocational expert, James T. Molski, Dr. Murati concluded claimant had lost the ability to perform six of 15 tasks, or 40 percent.

The parties also deposed Dr. Larry Wilkinson, who practices family and occupational medicine. The doctor began treating claimant in June 2002 and was continuing to treat claimant at the time of his March 2003 deposition. According to Dr. Wilkinson, claimant has cervical spinal stenosis with residual chronic pain syndrome and, therefore, should

avoid pushing, pulling and lifting more than 20 pounds and avoid overhead reaching. The doctor testified the weight restrictions are warranted as exceeding 20 to 25 pounds pulls on the neck muscles. Dr. Wilkinson was not asked his opinion of claimant's permanent functional impairment rating or her loss of work tasks.

Because claimant's injury is not listed in the scheduled injury statute, K.S.A. 1999 Supp. 44-510d, her entitlement to permanent partial general disability benefits is governed by K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's retained ability to earn wages rather than the actual wages being earned when

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

And the Kansas Court of Appeals in *Watson*[4] held the worker's failure to make a good faith effort to find appropriate employment following an injury does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[5]

In the claim at hand, claimant argues she has made a good faith effort to find work following her termination at Wichita Inn and, therefore, she has established a 100 percent wage loss for purposes of the permanent partial general disability formula. But respondent disagrees and argues the 49 contacts with potential employers that claimant made after being terminated by Wichita Inn in July 2002 fail to establish a good faith effort to find employment. The Board agrees.

According to the vocational experts, in the 15-year period before her accident claimant worked as a waitress, hotel desk clerk, foundry lab technician, and telephone solicitor. In addition, according to deposition exhibit 2 to Ms. Terrill's deposition, claimant also co-owned a computer company for approximately 11 months during 1997.

Considering claimant's work experience and considering the fairly limited number of contacts that claimant made between July 2002 and her January 2003 regular hearing, the Board is not persuaded claimant made a good faith effort to find other work. Many of claimant's 49 contacts were made to follow up on earlier inquiries and many of the contacts

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[3] *Id.* at 320.

[4] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[5] *Id.* at Syl. ¶ 4.

were made by telephone. Claimant's finances may have limited her opportunities to personally visit potential employers. But there is nothing in the record to explain why claimant could not have contacted more potential employers by telephone.

As claimant has failed to satisfy her burden of proving that she made a good faith effort to find appropriate employment after July 12, 2002, a post-injury wage should be imputed for purposes of the permanent partial general disability formula. Claimant has demonstrated she retains the ability to earn $285 per week, which is what she was paid working for Wichita Inn. Accordingly, that wage will be utilized in the permanent partial general disability formula. Comparing $285 to claimant's pre-injury wage of $335.20 yields a 15 percent wage loss.

For claimant's task loss, the Board concludes claimant more probably than not should observe a weight-lifting restriction. Accordingly, the Board adopts Dr. Murati's opinion that claimant has lost the ability to perform approximately 40 percent of the work tasks she performed in the 15-year period before her May 2000 accident.

Averaging the 15 percent wage loss with the 40 percent task loss creates a 28 percent permanent partial general disability.

2. Dr. Twillman's September 19, 2003 report.

On July 11, 2003, the Judge appointed Robert K. Twillman, Ph.D., to conduct an independent evaluation. Dr. Twillman evaluated claimant in August 2003 and forwarded his September 19, 2003 report to Judge Barnes. The Division of Workers Compensation received Dr. Twillman's report on September 22, 2003, well within the parties' terminal dates, which the Judge extended to November 5, 2003.

The Workers Compensation Act empowers the administrative law judges to appoint neutral health care providers to evaluate injured workers and report their findings to the judges. And "[t]he report of any such health care provider shall be considered by the administrative law judge in making the final determination."[6] Accordingly, the Board concludes Dr. Twillman's September 19, 2003 report is part of the evidentiary record.

AWARD

WHEREFORE, the Board reduces claimant's permanent partial general disability from 60 percent to 28 percent.

[6] K.S.A. 44-516.

Susan L. Waring is granted compensation from Heritage Restaurant and its insurance carrier for a May 7, 2000 accident and resulting disability. Based upon an average weekly wage of $335.20, Ms. Waring is entitled to receive 48.14 weeks of temporary total disability benefits at $223.48 per week, or $10,758.33, plus 106.92 weeks of permanent partial general disability benefits at $223.48 per week, or $23,894.48, for a 28 percent permanent partial general disability, making a total award of $34,652.81, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director